Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1866

GEORGE J. SKALICKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

GEORGE J. SKALICKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, GEORGE J. SKALICKY, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals for the Fifth Circuit. The court affirmed the Judgment and sentence of the United States District Court for the Eastern District of Texas whereby Petitioner was found guilty of violating 26 U.S.C. Section 7201 on two (2) of three (3) counts and was sentenced to one (1) year and fined $1,000.00 as to one (1) count involving the taxable year

1975; to three (3) years and fined $1,000.00 as to one (1) count involving the taxable year 1976 such sentence to run consecutively with the sentence for the taxable year 1975 with the sentence as to the imprisonment only being suspended and the Defendant placed on probation for a period of three (3) years conditioned upon the payment of the fine and the making of restitution in the amount of $21,061.00.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at ____ F.2d ____, *U.S. v. Skalicky* (5th Cir. April 24, 1980).

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on April 24, 1980, and this Petition for Certiorari was filed within thirty (30) days from such date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. As a matter of law, there is no underpayment of income tax for the year 1975 in the case at bar when the principles enunciated in *U.S. v. Holland* are properly applied.

2. "Willfulness" is lacking as a matter of law as to both counts in a case at bar when the principles enunciated by the Supreme Court in *Spies, Bishop* and *Holland* are applied to the Fifth Circuit Opinion which is in itself contrary to the criteria enumerated by the Lower Court in *U.S. v. Shafer.*

3. The Judgment of the trial court ordering Defendant to make restitution in the amount of $21,-061.00 as a condition for suspending the sentence imposed for Count III and of Defendant's probation is in violation of 26 U.S.C. 7201 and is, thus, beyond the power and jurisdiction of the trial court to order and is, thus, fundamental error because it is not authorized by the statute as a form of punishment; and the Lower Court's failure to exercise supervision constitutes such a departure from the accepted and usual course of judicial proceedings as to call for this Honorable Court's power of supervision.

STATEMENT OF THE CASE

Petitioner was indicted on three (3) counts, covering the years 1974, 1975 and 1976 for violation of 26 U.S.C. 7201, popularly known as "the tax evasion statute" which provides in material part that any "* * * person who willfully attempts in any manner to evade or defeat any tax * * * or the payment thereof shall * * * be guilty of a felony and, upon conviction thereof shall be *fined not more than $10,000.00* or imprisoned not more than five (5) years, or both * * *." (Emphasis supplied)

The so-called net worth or indirect method of proof was relied upon by the Respondent to prove the sums alleged as corrected taxable income and the correct tax due for each of the prosecution years.

Following his trial before and his conviction on all three (3) counts by a jury, the Petitioner filed a Motion for Judgment of Acquittal as to all three counts on the grounds that the "Government has failed to introduce substantial evidence of an essential element of the case, this being that the Defendant owed any Federal income tax" for the years 1974, 1975 and 1976 "which he failed to pay". Trial Court granted the Motion as to Count I although the Court below in footnote 3 to its opinion states that "no reasons were assigned" by the trial court, it is the usual and customary practice of Courts to grant or deny motions on the basis of the reasons and grounds advanced in support thereof and set forth therein, and it is reasonable to conclude that such was done in this case.

This conclusion is strengthened by the language of the formal order entered by the trial court. This being true, it follows that Petitioner could have had no increase in net worth in 1974 as alleged by Respondent and that the credibility of the evidence bearing upon Petitioner's net worth for such year was rejected. Thus, the closing net worth, and for all that appears the opening net worth for such year as well were rejected. The closing net worth for 1974 is also the opening net worth for 1975 without which there can be no accur-

ate reconstruction of income for 1975 by means of the net worth method as a matter of law. The accuracy of the income determined by the Respondent for the year 1976 would also be highly suspect. Any tax based upon suspect income could not have been proven by evidence beyond a reasonable doubt.

It is essential to the operation of the net worth method that accurate opening net worth for the taxpayer be established with reasonable certainty. Without an accurate opening net worth future increases simply cannot be measured or determined.

The element of Petitioner's willfullness must be proved beyond a reasonable doubt in criminal tax evasion cases. This involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income. It may, however, be inferred from a consistent pattern of under reporting large amounts of income. This the Fifth Circuit says has been established by the Respondent for all three prosecution years. But this is simply untrue in view of the trial judge's granting of the Petitioner's Motion for Acquittal on Count One (1) involving the year 1974 on the grounds that there had been a failure of proof that Petitioner owed any tax for such year he did not pay. To hold otherwise is to use the evidence as to 1974 which was rejected by the trial judge as being insufficient to establish beyond a reasonable doubt that Petitioner owed any tax

in such year that he did not pay, and reach the opposite conclusion. This is not the prerogative of the Appeals Court as a matter of law.

Without an accurate closing net worth for 1974, there can be no accurate opening net worth for 1975 from which to determine any increases in net worth for such year and any future years. Thus, it cannot be said beyond reasonable doubt that there was any consistent pattern of understatement of income.

With regard to question No. 3 if there is one rule in Federal Criminal Practice which is firmly established and adhered to by the Supreme Court it is that an Appellate Court has no control over a sentence which is within the limits allowed by the controlling statute. But, where, as here, the sentence of the trial court is not within the controlling statute, it is the duty of the Appellate Court to exercise its inherent power of supervision. Further, the controlling statute in Federal Law generally and in Federal Tax Law specifically, sets the jurisdiction as well as the venue of any court action involving the refund or collection of a tax. A Federal Court in tax matters has only the power and jurisdiction which Congress, through the controlling statute has given it. No jurisdiction or power to collect any tax by means of a sentence calling upon a convicted taxpayer to make restitution in any amount is conferred upon the District Court under Section 7201. The Internal Revenue Service is provided with other means to

collect any tax determined to be owed through administrative procedures as well as court actions if necessary.

Thus, the District Court here had neither the jurisdiction nor the power to order Petitioner to make restitution in any amount and the proposition is to well established to require the citation of authority that the question of the court's jurisdiction may be raised at any time in the course of a proceeding by any party or by the court acting on its own motion. The Fifth Circuit should have taken note of the lack of jurisdiction of the District Court to order restitution to be made and exercised its supervisory power. Its failure to do so constitutes fundamental error and a departure from the accepted and usual course of judicial proceedings so as to call for this Court's supervision.

REASONS FOR GRANTING CERTIORARI

In accordance with the qualifications for review on Certiorari as specified in Rule 19 of the Rules of this Supreme Court, the decisions of the District Court and the Court of Appeals for the Fifth Circuit are in conflict with the decision of this Court in *Holland v. U.S.*, 348 U.S. 121 (1954). In view of the great length of time and the increased use of the net worth method of reconstructing income since this Court approved the use of such method in tax fraud cases and laid down the guidelines restricting its use, we believe that this Court should re-define the guidelines to be followed by taxpayers as well as those charged with enforcement of the tax statutes.

Further, the use by the Court of Appeals of evidence, the credibility of which was rejected by the trial judge to find the element of willfulness and the sanctioning by it of the District Court's exceeding its power and jurisdiction by ordering a restitution to be made by the Petitioner has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Supreme Court's supervision.

QUESTION NO. ONE RESTATED

As A Matter Of Law, There Is No Underpayment Of Income Tax For The Year 1975 In The Case At Bar When the Principles Enunciated in *U.S. v. Holland* Are Properly Applied.

ARGUMENT AND AUTHORITIES UNDER QUESTION NO. ONE

After his conviction by a jury on all three counts of the indictment covering the years 1974, 1975 and 1976 for evasion of income tax the Petitioner filed a Motion for Judgment of Acquittal for all three years and the grounds urged for such acquittal were that "* * * the Government has failed to introduce substantial evidence of an essential element in the case, this being that the Defendant owed Federal Income Tax * * *" for the years 1974, 1975 and 1976 "* * * which he failed to pay." (R. 10; Appendix No. 3 Page 12a this petition). The trial judge granted the Motion as to Count One (1) covering the year 1974 and denied as to Counts Two (2)

and Three (3) involving the years 1975 and 1976. (Appendix No. 4, Page 13a this petition). Although the Court of Appeals in Footnote 3 of its Opinion (Appendix No. 1, Page 4a this petition), states that "no reasons were assigned" by the trial Court, it is submitted that the usual and customary practice of the Court is to grant or deny motions on the basis of the reasons set forth in the motion and that it is reasonable to conclude absent evidence to the contrary, that the trial judge followed the usual practice and granted the Motion for Acquittal on the grounds set forth in the Motion, namely that there had been a failure of proof showing Petitioner owed any tax for 1974 which he failed to pay. This conclusion is strengthened by the formal order entered (See Appendix No. 1, Footnote 3, Page 4a and Appendix No. 4, Page 13a this petition).

Moreover, there having been a failure of proof showing Petitioner owed any tax in 1974 which he failed to pay, it follows that there was a failure of proof showing Petitioner to have had any income for such year other than what he reported and paid tax on. Hence, the credibility of Petitioner's closing net worth as determined by the Respondent, and for all that appears its determination of Petitioner's opening net worth as well were rejected by the trial judge. This same is also true of the Respondent's determination of non-deductible expenditures in 1974. Thus, the closing net worth for 1974 being also the opening net worth for 1975 there can be no accurate reconstruction of income for 1975 by means of the net worth method as a matter of law.

The so-called net worth plus expenditures method of proving unreported income in criminal income tax evasion cases was first approved by the Supreme Court in 1943 in *United States v. Johnson*, 319 U.S. 503 (1943). An essential condition in so-called net worth cases is the establishment with reasonable certainty of an opening net worth. "* * * to serve as a starting point from which to calculate future increases in the taxpayer's assets." *Holland v. United States*, 348 U.S. 121 (1954); *Merritt v. United States*, 327 F.2d 820 (5th Cir. 1964). The accuracy of this figure is of utmost importance inasmuch as the correctness of the result is entirely dependent upon inclusion of all assets on hand at the beginning of the year in question. *Holland v. United States*, Supra. Equally essential to the use of this method is the establishment, "with reasonable certainty" of the closing net worth of the taxpayer at the end of the year, that is, the taxpayer's opening net worth at the beginning of the ensuing year. *United States v. Schafer*, 580 F.2d 774 (CA5, 1978). Without a proper opening and closing net worth there can be no correct result. *Holland v. United States*, Supra; *Taglianetti v. United States*, 398 F.2d 558 (CA1, 1968); See generally, 2 *Mertens, Federal Income Taxation*, Section 12.12 (1967).

In the instant case, the trial court having viewed all of the indirect proof as well as the direct evidence concluded that the Respondent failed to prove beyond a reasonable doubt the opening and closing net worth of the taxpayer for the year 1974. Thus, the Respondent having failed to prove with reasonable certainty the

closing net worth of the taxpayer, at December 31, 1974, it necessarily follows that there has been a failure on the Respondent's part to establish an accurate opening net worth at the beginning of the year 1975; without an accurate opening net worth for the year 1975 there is no basis from which can be calculated any future increase in Petitioner's assets. *Holland v. United States,* Supra. It cannot, therefore, as a matter of law, be held that the Petitioner had any income over what he reported and paid tax on in 1975. This is true irrespective of whether the opening net worth for the year 1976 be considered as having been established with reasonable certainty. *Holland v. United States,* Supra.

The net worth method is a method of reconstructing income rather than of computing it. The method can be deficient in that it often results in an inaccurate statement of income, or the placing of income in the wrong year. At best, it produces only an approximation. *Ragsdale v. Paschal,* 118 F.Supp. 280 (E.D. Ark., 1954); *United States v. Clark,* 123 F.Supp. 608 (S.D. Cal., 1954); 2 *Mertens,* Supra, at Pg. 56. It may attribute income to a year in which it is used to purchase visible assets rather than to an earlier year when the income should have been and probably was reported. And, as Fifth Circuit has stated, a mere increase in net worth does not show fraud in the absence of clear and convincing evidence, not to mention evidence beyond a reasonable doubt, that the increase represents *current taxable income. Fairchild v. United States,* 240 F.2d 944 (CA5, 1957).

With regard to the year 1976, assuming *arguendo* that the Government's net worth statement at the end of 1975 correctly portrays Petitioner's assets at the time, is it to be further assumed that the income with which they were purchased is accurately attributable solely to the year 1975? In this connection, it is to be remembered that the trial court has determined that Petitioner owed no income tax for the year 1974 which he did not pay. Thus, it is submitted that the validity of such assumption is far from clear and convincing and raises at the very least a reasonable doubt. *Fairchild v. United States,* Supra. Further, may it be said with absolute certainty that the income with which the assets the Respondent's net worth statement would show Petitioner owning at December 31, 1976, were purchased, properly to be attributed to the year 1976? Again, it is submitted that this Court is unable to make such determination beyond a reasonable doubt on the basis of the record before it. And to affirm the trial court, such a determination is mandatory.

It is submitted that there is no way by which such determination may be made beyond a reasonable doubt except by using evidence the credibility of which was rejected by the trial court.

To repeat, the trial court has determined that the Respondent failed to prove beyond a reasonable doubt that Petitioner owed any income tax in 1974 which he had not paid. It is not necessary for it to explain its chain of reasoning in making such findings where the net

worth method is used so long as the findings represent its best judgment based upon the entire record. 2 *Mertens,* Supra, at page 57. However, as has been heretofore demonstrated such findings effectively exclude from consideration the assets which the Government maintained were owned by the Petitioner at December 31, 1973, and at December 31, 1974. While the exclusion of the assets might not be prejudicial under some circumstances, where, as in the instant case, their value is great enough, their exclusion will affect understatement of income in 1975 and 1976 so as to make the alleged violation appear more flagrant or willful. *Merritt v. United States,* Supra.

In fact, with the exclusion of such assets, there is no way of determining whether the income with which those alleged to be on hand at the end of the years 1975 and 1976 were purchased was not attributable to years preceding prosecution years. *Holland v. United States,* Supra.

QUESTION NO. TWO RESTATED

"Willfulness" Is Lacking As A Matter Of Law As To Both Counts In The Case At Bar When The Principles Enunciated By The Supreme Court In *Spies, Bishop* And *Holland* Are Applied To The Fifth Circuit Opinion Which Is In Itself Contrary To The Criteria Enumerated By The Lower Court in *United States v. Schafer.*

ARGUMENT AND AUTHORITIES UNDER QUESTION NO. TWO

One of the most important elements in a trial under 26 U.S.C. 7201, is that of willfulness. And as the Lower Court pointed out, few "* * * areas pose more difficulty than the definitions of the words 'willfully attempts' in the statute." (Appendix 1, Page 5a of this Petition). It cannot be inferred from the mere understatement of income but must be proven by independent evidence. *Holland v. United States,* Supra. The showing of willfulness usually must be made by circumstantial evidence. See e.g., *Spies v. United States,* 317 U.S. 492 (1943); *United States v. Burrell,* 505 F.2d 904 (CA5, 1974); *United States v. Jernigan,* 411 F.2d 904 (CA5, 1969), Cert. Den., 396 U.S. 927 (1969). Furthermore, this court has held that the term requires more than a showing of careless disregard for the truth. *United States v. Bishop,* 412 U.S. 346 (1973).

But, proof of evil motive or bad intent is not necessary. As used in the controlling statute, the term "willfully" means a voluntary, intentional violation of a known legal duty. *United States v. Pomponio,* 429 U.S. 10, (1976); *United States v. Bishop,* Supra.

In the instant case, the record is replete with the Petitioner's openness. At the outset he advised the agents of his bank accounts and waived his right to intervene on any summons giving the agents access to the bank

records. True, he failed to mention a few items, in a series of at least 7 interviews with the Internal Revenue Agents, but these omissions cannot be likened to a studied attempt to conceal their existence, since most of them were brought to light from the bank records to which Petitioner gave the agents access.

The Lower Court has set forth a variety of ways, by way of illustration and not by way of limitation, that proof of intent, or willfulness, may be made. See *United States v. Schafer,* Supra, at page 781, footnote 8.

For example, affirmative willfulness may be inferred from such conduct as maintaining a "double set of books", of which there was no evidence; "making false entries or alterations, or false invoices or documents", of which again there was no such conduct, "destruction of books or records", of which the only instance was the habitual destruction of the daily cash register tapes after the entry of the daily sales of George's Coffee Bar were entered in the books and the deposit of such receipts in the bank; "concealment of assets or covering up sources of income" of which the only complaint was the Petitioner's failure to mention a fifth wheel trailer in which he resided, a small bank account in the First National Bank of Whitehouse and one at East Texas Savings & Loan Association; "handling one's affairs to avoid making the records usual in transactions of the kind" of which there is no evidence here; and "any conduct the likely effect of which would be to mislead or to conceal", of which again there is no evi-

dence of the magnitude necessary to show willfulness or an intent to defraud. *Spies v. United States,* Supra.

Petitioner had a long standing daily routine of totaling the cash register tapes, entering the amount of sales on his books and then destroying the tapes. While perhaps not perfect bookkeeping, this does not demonstrate willfulness. And this is substantiated by Petitioner's almost fettish habit of depositing everything in the bank. (S.F. 327, 340-342, 356). Nor does the Respondent claim and is there no evidence in the record to show that all receipts were not so deposited. (TR 404).

Further, there appears to have been no expenditures or loans made except by check. Thus, all of Petitioner's bank accounts, brokerage accounts, purchases and other transactions could and were actually brought to light through the records which he delivered to the agents. (TR. 417-422).

This Court has further ruled that willfulness may also be shown by affirmative acts of evasion "such as concealment of financial transactions and the providing of false or incomplete information in an attempt to hamper the investigation". See *United States v. Schafer,* Supra, and cases cited at footnote 8. If this be true, then the converse is also true, that is to say that the lack of willfulness may also be shown by affirmative actions of cooperation, openness and candor which helped expedite the investigation, notwithstanding the comments of the trial judge. (TR. 327, 337, 340, 342-360, 410-414, 599).

Moreover, "a consistent pattern of understatement has been held to present a jury question as to willfulness", *United States v. Tunnell*, 481 F.2d 149 (CA5, 1973). So also has the failure to report a very substantial amount of income been held to be affirmative evidence of willfulness. *United States v. Schechter*, 475 F.2d 1099 (CA5, 1973); *Wardlaw v. United States*, 203 F.2d 844 (CA5, 1953). As has been demonstrated elsewhere herein, the trial court vacated the Petitioner's conviction for the year 1974 for the reason that "the Government has failed to introduce substantial evidence of an essential element. '* * * that the Defendant owed Federal Income tax for the year 1974", thus in effect ruling that Petitioner's opening and closing net worth for the year 1974 (the latter being Petitioner's opening net worth for the year 1975) had not been established with reasonable certainty. Further, without the opening net worth for 1975 having been established "with reasonable certainty" it is impossible to determine that there was any omission, substantial or otherwise, the year 1975, without which there can be no conviction under the statute.

There is no evidence of a consistent pattern of understatement. Nor has the Respondent been able to point to any substantial item of income omitted in either 1975 or 1976. *United States v. Tunnell*, Supra; *United States v. Schechter*, Supra.

There is no evidence of any affirmative lies made by the Defendant to the Treasury Agents during the in-

vestigation. To the contrary, any items of which the Petitioner may have omitted to inform the agents (if such omissions may be actually termed as lies) were easily tracted and brought to light from the records furnished by Petitioner or through the cooperation of the Petitioner, were made available to the agents. (TR. 342-360).

The Lower Court's finding of a consistent pattern of understating large amounts of income is based entirely upon Respondent's net worth statements of the credibility of which were rejected by the trial court as they pertain to the years 1974 and 1975 and evidence a misunderstanding of the operation of the net worth method of reconstructing income.

QUESTION NO. THREE RESTATED

The Judgment Of The Trial Court Ordering Defendant To Make Restitution In The Amount Of $21,061.00 As A Condition For Suspending The Sentence Imposed For Count III And Of Defendant's Probation Is In Violation Of 26 U.S.C. 7201 And Is, Thus, Beyond The Power And Jurisdiction Of The Trial Court To Order And Is, Thus, Fundamental Error Because It Is Not Authorized By The Statute As A Form Of Punishment; And The Lower Court's Failure To Exercise Supervision Constitutes Such A Departure From The Accepted And Usual Course of

Judicial Proceedings As To Call For This Honorable Court's Power Of Supervision.

ARGUMENT AND AUTHORITIES UNDER QUESTION NO. THREE

It is a firmly established rule in Federal Criminal practice and one adhered to by this Court that an Appellate Court has no control over a sentence which is within the limits prescribed in the controlling statute. *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Dorszynski v. United States*, 418 U.S. 424, 441 (1974); *Gore v. United States*, 357 U.S. 386, 397 (1958); *Gurera v. United States*, 40 F.2d 338, 340-341 (CA8, 1930) Cf. *Yates v. United States*, 356 U.S. 363.

The controlling statute here is 26 U.S.C. 7201 which reads, as follows:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Petitioner was sentenced to serve one year and to pay a fine of $1,000.00 as to Count II. As to Count III, he was sentenced to a term of three (3) years and fined

$1,000.00, such sentence to run consecutively to the sentence on Count II. The sentence as to imprisonment for a period of three (3) years was suspended and Petitioner was placed on probation for a period of three (3) years provided he make restitution in the amount of $21,061.00 (Appendix No. 2, Page 10a, this petition).

Statute quoted above does not provide for restitution as a form of punishment. Nor is the District Court given jurisdiction under Section 7201 to collect any part of any alleged underpayment of the tax.

The Respondent acting through the Internal Revenue Service is provided with other means to collect any tax determined to be due and owing by means of administrative procedures. See 26 U.S.C. 6301-6344 as well as court actions, if necessary. See 26 U.S.C. 7401-7408.

Furthermore, the controlling statute in Federal law generally and in Federal Tax Law specifically sets the jurisdiction as well as the venue of any court action involving the refund or collection of tax. See for example 28 U.S.C. 1346(a)(1) for jurisdiction of District Court in refund suits, and 28 U.S.C. 1340, 1395 and 1396 for general jurisdiction of District Courts involving Internal Revenue and venue of suits for the collection of any tax.

A Federal Court in tax matters has only the power and jurisdiction which Congress through the con-

trolling statute has given it. No jurisdiction or power to collect any tax by means of a sentence calling upon a convicted taxpayer to make restitution in any amount is conferred upon the District Court under Section 7201. Thus, the District Court had neither the jurisdiction nor the power to order Petitioner to make restitution in any amount. And it is too well established to require the citation of authority that the question of the court's jurisdiction may be raised at any time during the course of a proceeding by any party or by the court itself acting upon its own motion.

The Fifth Circuit should have taken note of the lack of jurisdiction of the District Court to order restitution to be made and to have exercised its supervisory powers. Its failure to have done so constitute a fundamental error and a departure from the accepted and usual course of judicial proceedings so as to call for this Court's supervision. See Rule 19(b), Rules of the Supreme Court of the United States.

All of the reasons urged above are, therefore, most strenuously urged as a basis for this Court's exercise of discretion in the granting of the writ.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and one (1) true and correct copy of the same to Mr. John Hannah, United States Attorney, Federal Building, Tyler, Texas 75702, postage prepaid, this the ____ day of May, 1980.

HENRY SCHWARTZ II

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus No. 79-5429

GEORGE J. SKALICKY,
Defendant-Appellant.

Filed: April 24, 1980

Appeal from the United States District Court for the Eastern District of Texas.

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER,* District Judge.

HUNTER, JR., District Judge:

George J. Skalicky appeals from his conviction by a jury of two counts of willful evasion of federal income

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* District Judge for the Western District of Louisiana, sitting by designation.

taxes.[1] The government established its case through the "net worth" approach. The procedure for this method was approved in *Holland v. United States*, 348 U.S. 121, 125, [46 AFTR 943] 75 S.Ct. 127, 130, 99 L.Ed. 150 (1954):

> "In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an 'opening net worth' or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income."

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1 26 U.S.C. §7201, the applicable statute, provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

See also *United States v. Schafer*, 580 F.2d 774 [42 AFTR 2d 78-5892] (5th Cir. 1978); *United States v. Calles*, 482 F.2d 1155 [32 AFTR 2d 73-5478] (5th Cir. 1973); *United States v. Tunnell*, 481 F.2d 149 [32 AFTR 2d 73-5537] (5th Cir. 1973).

On appeal, Skalicky contends that the district court's action in granting a Judgment of Acquittal on the first count completely discredited the validity of the government's net worth computations; that the record contains no evidence of willfulness; and that the trial court erred in admitting into evidence certain government charts and summaries. These contentions have been earnestly and ably presented by appellant's counsel, but we are quite sure that they are totally without merit. We affirm the judgment of conviction.

The jury returned a verdict of guilty on all counts.[2] Following the trial, defendant filed a Motion for Judgment of Acquittal as to all three counts on the grounds that "* * * the Government has failed to introduce substantial evidence of an essential element in the case, this being that the Appellant owed Federal Income Tax * * *" for the years 1974, 1975 and 1976 "* * * which he

---

2 Count I involved income tax allegedly due and owing for 1974. The 1975 tax return was the subject of Count II, and the 1976 return was the subject of Count III.

failed to pay." The District Judge granted the motion as to Count I and denied as to Counts II and III.[3]

Defendant argues that the entry of the judgment of acquittal completely discredited the government's net worth statement and the validity of its computation of the opening and closing net worth for each of the calendar years. This argument is based on several mistaken assumptions. There is absolutely nothing in the trial court's action to justify the conclusion that appellant attributes to it. Contrariwise, the denial of the motion as to Counts II and III attests to an endeavor to carefully weigh the evidence as to each count. Our inquiry is limited to a determination of whether the evidence is sufficient to support the jury's conclusion that the defendant was guilty beyond a reasonable doubt on Counts II and III. What the judge did with the remaining count is immaterial.[4] *United States v. Dubea*, 612 F.2d 950 (5th Cir. 1980); *United States v. Varkonyi*, 611 F.2d 84

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3 No reasons were assigned. The formal order entered read:

"Came on this day to be considered Defendant's Motion for Judgment of Acquittal in the above styled and numbered cause of action and the Court is of the opinion that the motion as to

"Count I is Granted,

Count II is Denied,

Count III is Denied.

"Signed this 11th day of July, 1979. /s/ Robert M. Parker Judge Presiding"

4 The government had a right to appeal under 18 U.S.C. §3731 from the Judgment of Acquittal on Count I. United States v. Varkonyi, 611 F.2d 84 (5th Cir. 1980); United States v. Burns, 597 F.2d 939, 940 (5th Cir. 1979). By brief the United States requests that we uphold the jury convictions for all three years and "bring the defendant forward for sentencing on Count I (1974)." However, no formal appeal was entered by the United States.

(5th Cir. 1980); *United States v. Michel*, 588 F.2d 986 (5th Cir. 1979). A careful review of the record reveals with reasonable certainty the beginning net worth and the increases in net worth for each year in question. Those figures were clearly proven by the introduction of Chart A during the testimony of Revenue Agent Smith, which gave the computation of the defendant's net worth for 12-31-73 as $18,769.67, for 12-31-74 as $41,761.33, for 12-31-75 as $71,738.18 and for 12-31-76 as $97,412.52. No useful purpose would be served by further recital of the testimony to demonstrate the accuracy of these calculations; it suffices to state that the evidence was more than sufficient for the jury to find beyond a reasonable doubt that substantial tax deficiencies existed for each of the three years.

Appellant can not really dispute the deficiencies in his tax returns, but argues vigorously that the government has failed to prove a willful attempt to evade payment of those taxes. He contends that willfulness cannot be inferred from the mere understatement of income but must be shown by independent proof. Whatever validity this argument might have as a single element, the record here reflects a number of facts which warrant an inference of willfulness.

Few areas of criminal law pose more difficulty than the definitions of the words "willfully attempts" in the statute. In *United States v. Bishop*, 1973, 412 U.S. 346 [32 AFTR 2d 73-5018], 93 S.Ct. 2208, 36 L.Ed.2d 941, the Supreme Court held that the term "willfully" requires

more than a showing of careless disregard for the truth. In *United States v. Pomponio*, 1976, 429 U.S. 10 [38 AFTR 2d 76-5905], 97 S.Ct. 22, 50 L.Ed.2d 12, the Court noted that proof of evil motive or bad intent was not necessary, and that willfulness in the context of the felony tax evasion statutes simply means a voluntary intentional violation of a known legal duty.

Defendant was the owner of George's Coffee Bar and a bingo parlor known as the Silver Dollar Ballroom. The use of cash was common in the two businesses, and defendant used large amounts of cash for the purchase of automobiles and gifts. The government has established that during the years of 1974, 1975 and 1976 he followed a persistent pattern of underreporting large amounts of income. His tax returns were prepared at H & R Block by Larry Wilson. Whatever information Wilson had was obtained from summary sheets furnished him by Skalicky, and what he furnished turned out to be totally erroneous. When Revenue Agent McPherson notified Skalicky that there appeared to be a substantial understatement of income on his (defendant's) tax returns, Skalicky replied, "everyone lies at times."

Here, the consistent pattern of understating large amounts of income, coupled with evidence of falsehood, surreptitious cash transactions and inadequate records kept by taxpayer, permits an inference of willfulness sufficient to create a jury question. *Spies v. United States*, 1943, 317 U.S. 492 [30 AFTR 378], 63 S.Ct.

364, 87 L.Ed. 418. The requisite affirmative act can be found in the filing of false returns for each year in the indictment. *United States v. Tunnell*, 481 F.2d 149 [32 AFTR 2d 73-5537] (5th Cir. 1973).

Summaries

We reject appellant's claim that the district court's treatment of the summaries and charts unduly prejudiced his trial. In permitting the jury to utilize them the court proceeded well within the discretion accorded it under Federal Rules of Evidence, rule 1006, 28 U.S.C.A. By instructing the jury that the summaries were not evidence, however, the trial judge took one further step to insure that the jury would not rely on the conclusory matter as independent proof of the appellant's guilt.[5]

Conclusion

Because the evidence establishes with reasonable certainty the beginning net worth and the increase in net worth for each year in question, and because there was sufficient evidence from which the jury could infer the requisite element of willfulness, and because we discern no prejudicial error of any nature, we affirm the judgments of conviction on Counts II and III of the indictment.

Affirmed.

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5 That the court below did not apply the rule so as to receive the summaries in evidence is understandable, in light of the conflicting case law, but prior uncertainties regarding the status of summaries are now resolved by rule 1006. See United States v. Smyth, 556 F.2d 1179 at 1184 (5th Cir. 1977).

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

versus No. TY-79-4-CR

GEORGE J. SKALICKY

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, July 23, 1979, with counsel, Dale Long of Tyler, Texas.

There being verdicts of guilty.

Defendant has been convicted as charged of the offenses of Income Tax Evasion, on Counts 1, 2, and 3 of indictment, under U.S. Title/Section 26:7201. (Motion of Defendant for Acquittal granted as to Count 1 under Court Order dated 7-11-79; and Motion of Defendant for Acquittal DENIED as to Counts 2 and 3, same date.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered as follows:

On COUNT 2: IT IS ADJUDGED that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of one (1) year, and fined the sum of One Thousand Dollars ($1,000.00).

The Defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

On COUNT 3: IT IS ADJUDGED that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of (3) years and fined the sum of One Thousand Dollars ($1,000.00).

The sentence on Count 3 is to run consecutively to the sentence on Count 2.

The execution of sentence as to imprisonment only is suspended and the Defendant is placed on probation for a period of three (3) years on the following terms and conditions:

That restitution in the amount of $21,061.00 be made as directed by the U.S. Probation Office.

The Defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

The order that the Defendant stand committed is stayed until Defendant is released from custody pursuant to the sentence imposed in Count 2.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum probation period of five years permitted by law may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ Robert M. Parker
U.S. District Judge

APPENDIX 3

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS,
TYLER DIVISION

UNITED STATES OF AMERICA

versus No. TY-79-4-CR

GEORGE J. SKALICKY

Filed: July 10, 1979

MOTION FOR JUDGMENT OF ACQUITTAL

COUNT I

Defendant moves the Court for judgment of acquittal on the grounds that the Government has failed to introduce substantial evidence of an essential element of the case, this being that the Defendant owed Federal Income Tax for the year 1974 which he failed to pay.

COUNT II

Defendant moves the Court for judgment of acquittal on the grounds that the Government has failed to introduce substantial evidence of an essential element of the case, this being that the Defendant owed Fed-

eral Income Tax for the year 1975 which he failed to pay.

COUNT III

Defendant moves the Court for judgment of acquittal on the grounds that the Government has failed to introduce substantial evidence of an essential element of the case, this being that the Defendant owed Federal Income Tax for the year 1976 which he failed to pay.

LONG & RAY
Attorneys at Law
818 Citizens Bank Bldg.
Tyler, Texas 75702

/s/ DALE LONG
DALE LONG

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 1979, a true and correct copy of Defendant's Motion for Judgment of Acquittal was hand delivered to the United States Attorney's Office.

/s/ DALE LONG
DALE LONG

APPENDIX 4

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS,
TYLER DIVISION

(Number and Title Omitted)

Filed: July 11, 1979

ORDER

Came on this day to be considered Defendant's Motion for Judgment of Acquittal in the above styled and numbered cause of action and the Court is of the opinion that the motion as to

COUNT I is Granted,

COUNT II is Denied,

COUNT III is Denied.

SIGNED this 11th day of July, 1979.

/s/ ROBERT M. PARKER
JUDGE PRESIDING

Supreme Court, U. S.
FILED
JUL 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1866

GEORGE J. SKALICKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL ARGUMENT AND AUTHORITIES UNDER QUESTION NO. 3

Since the filing of the Petition herein and the brief in support thereof, the late opinion of the Court of Appeals for the Ninth Circuit in *United States v. Conforte*, ____ F.2d ____ (45 AFTR 2d 80-1630) (CA 9, April 30,

1980) has come to our attention. In that case, the Court of Appeals vacated the sentence of the District Court for the District of Nevada under 26 USC 7201 as not being within statutory prescribed bounds. While the *Conforte* case bears only tangentially upon the situation presented in Question No. 3 of the Petition, it does involve the same statute and illustrates certain limitations in sentencing thereunder. Thus, the sentencing process, being so intermingled with the fundamental rights of a defendant as it is, may not be used by the trial judge as a vehicle to achieve an end unrelated to a defendant's prognosis for reform and in derogation of those constitutional rights. Nor may a sentence be based upon an unproven assumption. *United States v. Conforte, supra.*

While the Probation Act, 18 USC 3651, gives trial judges a wide latitude of discretion in the imposition of conditions of probation, it expressly limits the amount of restitution to "* * * actual damages or loss caused by the offense for which conviction was had." 18 USC 3651. The mere computations of the Revenue Agent and Special Agent, both of whom testified at the trial of Petitioner do not legally determine a tax liability. *United States v. Taylor,* 305 F.2d 183 (CA 4, 1962), cert. den. 371 US 894 (1962). Nor does the District Court have jurisdiction under 26 USC 7201, to make such determination. *United States v. Stoehr,* 196 F.2d 276 (CA 3, 1952), cert. den. 344 US 826 (1952).

The determination of Petitioner's tax liability can only be made by his acquescience in the assessment of a

deficiency by the Commissioner of Internal Revenue or a final adjudication by a court of competent jurisdiction. *United States v. Taylor, supra; United States v. Stoehr, supra.* See also 26 USC 6213, 6214, and 7442. No assessment has been made of the $21,061.00 ordered to be paid "as directed by the U.S. Probation Office", and, as demonstrated in the original Petition filed herein, the District Court acting under 26 USC 7201 lacks jurisdiction in the premises. Nor may it use the Probation Act and sentencing process as vehicles to acquire jurisdiction. This being true, it may not delegate to the Probation Office that which it does not have. To deprive Petitioner of the administrative and judicial procedures and the protections against arbitrary assessment of tax provided in the taxing statutes is to deprive him of equal protection of the laws, in derogation of his constitutional rights. Cf., *United States v. Conforte, supra.*

Respectfully submitted,

HENRY SCHWARTZ II
P.O. Box 1398
Tyler, TX 75710

AC 214/593-7316

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Supplemental Brief in Support of Petition for Writ of Certiorari have been mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and one (1) true and correct copy of the same to Mr. John Hannah, United States Attorney, Federal Building, Tyler, Texas 75702, postage prepaid, this the ____ day of July, 1980.

HENRY SCHWARTZ II